MICHAEL RODAK, JR

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-1394

THE CALIFORNIA HIGHWAY COMMISSION, et al.,
Petitioners

VS.

LA RAZA UNIDA OF SOUTHERN ALAMEDA COUNTY, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
to the United States District Court for the
Northern District of California

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The California Highway Commission and the other state officers, employees and agencies named as defendants in the district court pray that a writ of certiorari issue to review the order of the United States District Court for the Northern District of California entered on November 9, 1971 prior to judgment on appeal pending before the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The memorandum and order of the district court of which review is sought is reported at 337 F. Supp. 221, and at 3 ERC 1306, and is set forth as Appendix A of this Petition.

JURISDICTION

The order and injunction of the district court was filed on November 9, 1971. A notice of appeal to the Court of Appeals for the Ninth Circuit was filed by petitioners, the record has been docketed, but the case has not been heard, submitted to or decided by that court. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 20 because of the great public importance of the question presented and its close relationship to the question raised by another case now before this Court.

QUESTION PRESENTED

May a state be required by court injunction to fully comply with federal laws and regulations in constructing a highway where the only federal connection with the highway was the granting of route location approval for a state highway in the federal-aid primary system and no further federal approval has been sought or obtained and no federal funds have ever been sought, obtained or expended in connection with the project?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth in Appendix B hereof beginning at page xxx. They include the following:

(1) Section 103 of the Federal-Aid Highway Act of 1968, 23 U.S.C. §103.

(2) Section 106 of the Federal-Aid Highway Act of 1968, 23 U.S.C. §106.

(3) Section 138 of the Federal-Aid Highway Act of 1968, 23 U.S.C. §138. The same language appearing as Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. §1653(f).

(4) Section 502 of the Federal-Aid Highway Act of 1968, 23 U.S.C. §502.

(5) Section 504 of the Federal-Aid Highway Act of 1968, 23 U.S.C. §504.

STATEMENT OF THE CASE

This is an action for declaratory and injunctive relief brought against state and federal highway officials. The jurisdiction of the district court was invoked because of questions relating to the duties of officials under federal statutes, the Federal-Aid Highway Act and other Acts.

The subject of this action is a freeway, State Route 238, which the State of California proposed to construct along a fourteen-mile route in the East Bay region of the San Francisco Bay Area. The freeway

will form a link between two other freeways, and will serve to remove through traffic from local streets and relieve congestion from a parallel freeway which runs along the eastern shore of the Bay. The new facility is a replacement for a conventional state highway which has long been in the federal-aid primary system, and, as such, this freeway, like 83% of all state highways in California, will be in a federal-aid system.

The California Highway Commission officially adopted the route of the highway on June 1, 1961, after public hearings and other procedural requirements had been met. Following the route adoption, the process of designing the freeway was begun. Beginning in 1965, the state entered into agreements with several local governments relating to the closing of city streets and other matters as required by California Streets and Highways Code, Section 102. These "freeway agreements" were adopted at public meetings and accompanied by a full presentation of the major design features of the freeway. As detailed design work on the project continued, the state began acquiring property for the future right of way. At the time this action was filed, the state had expended approximately $15,232,000 of its funds on right of way acquisition.

In 1966, the State sent maps of the proposed route to the regional office of the Federal Highway Administration for review. Under procedures then in effect, the federal officials granted "location approval" to the proposed route by signing a strip map. This

approval, accorded on November 4, 1966, signified that the State had met all then existing federal standards which were applicable to projects in that stage of development, and is the first of several approvals which must be obtained before a project becomes eligible for federal funds.

Location approval on November 4, 1966, represents the only formal federal approval of this route ever applied for by the State of California. Since that date, state and federal highway officials have conferred on several occasions regarding the route, but no further federal approval has been sought or accorded.

No federal funds have ever been received by the State of California for any activity connected with Route 238. All right of way acquisition, relocation payments, design work, administrative costs and other expenditures in relation to this proposed highway has been paid for wholly and exclusively with state funds. The federal government is not legally or otherwise obligated to pay or reimburse any part of the cost of any activity connected with this highway unless and until the state applies for and the federal government grants approval of plans, specifications and estimates pursuant to 23 U.S.C. §106(a).

In summary, the highway which is the subject of this action is a state highway in the federal-aid primary system, which, in 1966, was accorded location approval by federal officials. Since that time, no further formal and regular federal approval for the highway has been sought or obtained. The state has expended a considerable amount of its own funds in

developing the project, but no federal funds have been used, or even sought, for any purpose or activity connected with this highway.

On June 16, 1971, the complaint in this action was filed in the district court. Named as plaintiffs are several Mexican-American organizations, the Sierra Club, and a number of individuals who reside in the general area of the proposed Route 238. Defendants in the action are federal officials, state officials and agencies, and officials of the City of Hayward.

In their complaint, plaintiffs alleged various violations of their rights under federal law in connection with the development of the Route 238 project. Most notably, plaintiffs alleged that the state and federal defendants had failed to comply with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646; 84 Stat. 1894) and its predecessor statute, Sections 501 to 511 of the Federal-Aid Highway Act of 1968 (23 U.S.C. §§501-511), the National Environmental Policy Act of 1969 (42 U.S.C. §4321), and with Section 4(f) of the Department of Transportation Act of 1966 (49 U.S.C. §1653(f)) and Section 138 of the Federal-Aid Highway Act of 1968 (23 U.S.C. §138).

In the course of proceedings in the district court, counsel for the state defendants stated that the state stood ready to construct the Route 238 project solely with state funds and to seek no further federal approval and no federal funds whatsoever in connection with the project.

Following several hearings, the issuance of an interim preliminary injunction, and the filing of briefs on various matters, on November 9, 1971, the district court filed its Memorandum and Order and its Preliminary Injunction. Thereby, the State of California was enjoined from acquiring any further real property for the Route 238 project, from removing or contacting any resident of premises on or near the route, and from "undertaking any other actions whatsoever in connection with the . . . project that would materially affect the environment". The federal defendants were enjoined "from continuing to accord or to accord any approval to the . . . project . . .". The order provided that the injunction would be lifted upon a showing of full and reasonable compliance with federal relocation provisions and federal parkland acquisition procedures.

The point of law upon which the injunction rests, and of which Petitioners earnestly seek review by this Court, was stated by the district court as follows:

> "The court believes that for the purpose of applying the various federal statutes and regulations a federal-aid highway is any project for which the state has obtained location approval. The state should not have the considerable benefits that accompany an option to obtain federal funds without also assuming the attendant obligations. Any project that seeks even the possible protection and assistance of the federal government must fall within the statutes and regulations." (337 F.Supp. at 227)

The district court held that a highway becomes a federal project when location approval is accorded,

whether any federal funds are ever spent on the highway or not. The court also held that federal requirements may be specifically enforced by court injunction at any time after location approval, even though the federal government has not paid and is under no legal obligation to pay and may never pay for any part of the highway project. In other words, a state highway project, conceived, planned and constructed wholly by the state and using only state funds, becomes a "federal project" when the state obtains the most preliminary approval under a federal grant-in-aid program. Having sought that first tentative federal approval, the state may not continue the project unless it complies fully with all federal standards and requirements which would be applicable if the project were being undertaken by the federal government itself or if federal funds were being used by the state.

REASONS FOR GRANTING THE WRIT

A. THE QUESTION PRESENTED BY THIS CASE HAS A DIRECT EFFECT ON A GREAT NUMBER OF HIGHWAY PROJECTS THROUGHOUT THE NATION, AND THE EARLIEST POSSIBLE DECISION BY THIS COURT IS NEEDED TO PREVENT GREAT WASTE OF PUBLIC FUNDS AND TO ALLOW NEEDED PROJECTS TO PROCEED TO COMPLETION PURSUANT TO THE CORRECT LEGAL STANDARDS.

The ruling of the district court in this case turns on a pure question of law: the statutory scheme of the Federal-Aid Highway Act and related legislation. The answer to the question posed has a direct and immediate effect upon thousands of miles of proposed and partially completed highways in California alone. This effect is undoubtedly duplicated in many other states.

The district court has held that it was the intent of Congress in enacting and amending the Federal-Aid Highway Act and related legislation that, once any federal approval was accorded a specific route, that route would be subject to all federal standards and requirements whether or not any federal funds are ever used on the route. If that is the law, then many state highway projects which are badly needed to meet immediate transportation needs and to replace less safe, substandard existing facilities, will be seriously delayed while long-completed planning activities are recycled to meet federal procedural requirements. To a considerable extent, this will necessitate useless rewriting of paperwork for submission to federal authorities. More importantly, however, these projects will be required to meet federal standards and requirements which were imposed by statute or regulation long after location approval was sought and obtained and which were unforeseen and unforeseeable when the project was submitted for location approval.

This ruling will require that thousands of projects, many of them ready for construction, be completely recycled in every state in the nation simply because location approval was obtained some time in the past. This will involve a substantial waste of thousands of man-hours and millions of dollars which have been expended in developing these projects. Further time and money will be expended by the states in preparing these projects for submission to federal authorities and by the federal government in reviewing the submissions and granting the required approvals. All this

is required not because federal funds have been or will ever be used on any of these projects, but merely because, some time in the past, state officials sought and obtained federal location approval for the project.

Recent decisions in federal trial courts and courts of appeal in cases involving projects which are concededly subject to federal laws and regulations indicate that federal requirements relating to environmental and similar considerations are extremely stringent. See *Lathan v. Volpe,* ..... F.2d ....., 3 ERC 1362 (9th Cir., Nov. 15, 1971); *Arlington Coalition v. Volpe,* ..... F.2d ..... (4th Cir., April 4, 1972); *Morningside-Lenox Park Assn. v. Volpe,* 334 F. Supp. 132 (N.D. Ga. 1971).) If these cases withstand further appeal, such projects may be halted in the midst of construction and after as much as ten or fifteen years of planning, if they fail to fulfill newly established federal requirements. If the courts holding in this case is upheld, thousands of state projects for which federal funds will never be sought or received, will be subject to the same stringent requirements.

Petitioners respectfully urge that the basis of the district court's ruling is not the law. Certainly the nation's state highway departments and the Federal Highway Administration have never considered that a state highway becomes a federal project when location approval is granted. Indeed, the court's ruling to that effect has so little support in the language of the statutes invoked and in the actual facts of the highway program in California and elsewhere, that California officials are reluctant to undertake the radi-

cal measures which the decision would require unless and until the district court's ruling is affirmed on the highest authority: a decision of this Court. In the meantime, highway projects throughout California and across the nation are proceeding under the threat of federal court injunctions based upon the ruling in this case.

The district court's ruling that a highway project becomes a "federal project", subject to specific enforcement by a court of all applicable federal standards and requirements, at the time federal location approval is accorded is not supported by the overall statutory scheme of the Federal-Aid Highway Act. A reading of the statutes as a whole clearly establishes an intent to create a conditional grant-in-aid system of the familiar type whereby Congress, by offering federal funds, seeks to induce state agencies to meet certain standards in the development of certain classes of highways. In setting forth the various standards and procedures, language such as "the Secretary shall not approve" and "federal funds shall not be expended" has been repeatedly used by the Congress. Obviously the "projects" which are subject to the Secretary's approval are those for which federal funds are sought. Such language is at the heart of all provisions invoked by plaintiffs in this action. (23 U.S.C. §138; 23 U.S.C. §502). The language of the statutes, firmly buttressed by the legislative history of the Act, clearly establishes that only with federal funds comes federal control; and only with federal funds does a highway become a "federal project". (See *Mahler v. United*

States, 306 F.2d 713, 716-21 (3d Cir.), cert. denied 371 U.S. 923 (1962)).

That these standards and procedures are conditions on the use of federal funds was repeatedly recognized by this Court in its opinion in the *Overton Park* case. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 at 405, 407, 411 (1971). It follows, of course, that if federal funds are not involved, the conditions do not apply.

With specific regard to "location approval", it is clear that Congress envisioned the several federal-aid systems as matrices upon which certain projects could be qualified for federal financial participation. It follows that the systems would include other projects which would not, and need not, qualify for federal funds. Section 103(e) states, in part, that "No Federal-aid system or portion thereof shall be eligible for projects in which federal funds participate until approved by the Secretary". (23 U.S.C. §103(e)). Section 105(a) provides that "The Secretary . . . shall not approve any project which is not located upon an approved Federal-aid system." (23 U.S.C. §105(a)).

The fact that Congress never intended to preempt the field of highway construction even on the Federal-aid systems is emphasized by the actual operation of the system. The fact is that there are not nearly enough federal highway funds to reimburse the states in the appropriate ratio for all of the fully qualified projects nominally in the Federal-aid highway systems. California's experience over the past ten fiscal

years has been that, of highway projects having received federal location approval and otherwise being qualified for federal funds, less than one-third, on a mileage basis, and little more than one-fifth, on a project basis, have ever received federal funds.[1] All other qualified projects have been completed exclusivly with state funds.

In the past it has been California's policy, and undoubtedly that of many other states, to routinely submit all projects located on Federal-aid routes to federal authorities for location approval. This could be done at little or no cost to the state, since state procedural requirements applicable at the route location stage of a project met or exceeded federal requirements. Later, as the project was developed, state officials could make a determination of whether to further qualify the project for federal financial participation, or proceed exclusively with state funds. If upon examination of the situation after location approval was obtained, it appeared that sufficient state funds were available or that it was not likely that federal funds would be available for the project, state officials would complete the projects with state funds and make no further submissions to the federal government. If, however, it was determined that federal funds would be available and needed for completion of a project, state officials would develop the project

[1]Evidence submitted to the trial court on affidavit indicates that, in the past ten fiscal years, 200 projects totalling 877.6 miles on the federal-aid primary, secondary and urban systems in California received federal funds, while 967 projects, totalling 2,883.9 miles, on these systems received no federal funds and were completed entirely with state funds.

pursuant to federal procedures and seek further federal approval, and, eventually, federal funds.

Petitioners submit that, given the statutory scheme, and the actual operation of the system, the consequences of failing to meet the standards or follow the procedures which are conditions precedent to federal funding should be the denial of federal financial participation, not a prohibition from proceeding with the project as though Congress had invoked the Supremacy Clause.

In contrast, the district court has held that, where location approval has been accorded, a state *must,* under pain of federal court injunction, comply with all federal laws and regulations which would be applicable if federal funds were used on the project. In return, the state has no assurance and little hope that federal funds will ever be available for many of the projects it is forced to qualify. Legally, the federal government is not bound to pay out any funds until approval under 23 U.S.C. Section 106 is accorded, and, as has been shown, appropriations are limited. It would, indeed, be highly unlikely that a federal court would issue its mandate to require the federal government to reimburse a state for the cost of a highway project which has met all federal requirements by order of the court.

It is submitted that, inasmuch as the standards and procedures set forth in the Federal-Aid Highway Act are nought but conditions precedent to the recepit of federal funds, the most that a court could do in the circumstances of this case is issue its

declaratory judgment that certain contested standards are applicable to the project at its, then, stage of development, and enjoin the federal officials from approving any federal funds for the project unless and until the standards are fully and timely met. Such a remedy would secure a complainant's full rights under the federal law before the rights become moot, and, contrary to the district court's statement in its opinion, effectively "keep the barndoor shut on the horses". Faced with such a court declaration, a state could comply with the federal requirement and move the project along toward federal financial participation. On the other hand, if federal funds were not available or not needed for the project, the state could proceed without complying, but in the certain knowledge that federal funds would never be available. Whichever option a state chose with regard to federal requirements, the project would have to comply with state requirements, which, in California, include both relocation assistance and environmental standards. This, it is submitted, would be a sound solution to the problem presented by this case. Such, however, is not the course chosen by the district court here. The district court would make a state highway a "federal project", not when federal money becomes involved, but when the first conditions for possible future federal financial participation are met.

Despite what Petitioners believe is the sound legal basis of its position and the intent of Congress, the ruling of the district court to the contrary is, at present, the law of this case and likely to be highly influential in a great many other cases. If the district

Court's ruling is correct, it is imperative that highway departments throughout the country know that on the highest possible authority at the earliest possible time so that they may shape their actions accordingly and discharge their duties to the public as the law requires.

B. THERE IS PRESENTLY BEFORE THIS COURT ANOTHER CASE WHICH PRESENTS A SUBSTANTIALLY SIMILAR QUESTION OF LAW, BUT WHICH ARISES FROM A VERY DIFFERENT FACTUAL AND PROCEDURAL CONTEXT.

The State of California has elected to seek a writ of certiorari in this Court before judgment on appeal to the United States Court of Appeals for the Ninth Circuit. This unusual procedure has been chosen for several reasons. The primary reason, of course, is that the case directly presents a question of statutory construction upon which hundreds of millions of dollars worth of public projects depend, and which must affect the future course of conduct of the highway officials of every state as well as the federal government. Another reason for seeking review now is that there is presently before this Court a petition for writ of certiorari in a case which presents a substantially similar question of law.

That case, *The Texas Highway Department, et al. v. Named Individuals,* is before this Court on a petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Though that case is very different from this case factually and procedurally, a decision in that case would almost necessarily affect any later decision rendered in this case. Counsel

have, therefore, felt it incumbent upon them to present this case to the Court at this time so that the Court may be apprised of some of the possible ramifications of a decision in the Texas case. Petitioners also hope that the two cases coming before the Court at the same time will serve to emphasize the great importance of the questions presented by the cases. It is earnestly hoped that an early decision may be obtained so that highway officials in California, in Texas, and throughout the nation may know what is required of them and can return to their duties in meeting the transportation needs of the public without risking hundreds of millions of dollars in state funds and years in litigation.

The two cases come to this Court on markedly different facts. In the Texas case, part of a highway project was under construction and federal funds reimbursing state expenditures had been received. An intervening segment of the project could not qualify for federal funding, because of the requirements of federal approval of construction through parklands pursuant to 49 U.S.C. Section 1653(f) and 23 U.S.C. Section 138. The Texas Highway Department, faced with a federal court injunction, elected to return all federal funds received for any part of the project and foreswear any federal financial participation in the future. The state then sought leave of the court to continue the partially completed project as a state project using solely state funds. It is the court's refusal to lift the injunction under those circumstances which the State of Texas seeks to have reviewed by this Court.

In contrast, in this case, no federal funds have ever been received or expended. The only formal federal action in the Route 238 project was the granting of location approval in 1966 at the request of the state. Unlike Texas, California has not, to date, foresworn all possible future federal financial participation for the project, though state highway officials have expressed a willingness to construct this badly needed facility solely with state funds and to seek no further federal approval or any federal funds at all. This is a distinction without a difference, however, for, if the federal standards and procedures are conditions precedent to the receipt of federal funds, such funds could not legally be paid if the conditions are not met, and disavowal is unnecessary. Furthermore, in this case, to now formally foreclose any future federal financial participation would do a disservice to the citizens and taxpayers of California, for, if the trial court's ruling is upheld on appeal, they would have to bear the whole expense of the project as well as the additional time and cost of fulfilling all federal requirements with no hope of reimbursement.

Despite their superficial differences, the Texas case and this case ultimately come down to essentially the same questions regarding the statutory scheme of the Federal-Aid Highways Act. When does a "state highway project" become a "federal project"? Did Congress intend that every state highway for which the state took even the most tentative steps along the path toward federal financial participation be forever locked into the system so that every federal requirement then in effect or thereafter imposed would be

specifically enforceable whether or not federal funds were ever utilized? Or, rather, did Congress intend the federal-aid highway program to be the more usual grant-in-aid scheme, where standards and procedures are set up as conditions precedent to the receipt of federal funds? If the latter is the case, then any appropriate project could be started upon the path, but could also leave the path at any point prior to federal contractual commitment at the, not inconsiderable, cost of the loss of federal funds.

CONCLUSION

During the past few years many new factors have been added to the federal law relating to highways. Requirements for the provision of replacement housing for highway dislocatees were enacted in 1968 and reinforced in 1971. The National Environmental Policy Act became law on January 1, 1970. There has been no lack of vigorous proponents of the policies and particulars set forth in these and related federal and state enactments, and a great many controversies grounded in this body of law have come before the federal courts. Much confusion and wide diversities of opinion can be seen in these cases on the part of the courts, the complainants and the governmental agencies charged with administering the highway program. Many of the points of controversy can be resolved by the lower federal courts and should not properly command the attention of this Court.

There are, however, certain questions in this very important and active field of litigation which should

properly be resolved by this Court. Such a question is directly posed by this case. Until the question of the congressional intent underlying the legislative scheme of the Federal-Aid Highway Act is determined on the highest authority, litigants and courts must proceed in confusion as to when federal requirements become applicable. More importantly, until this question is resolved highway officials throughout the nation cannot know what the law requires of them.

It is, therefore, respectfully submitted that a hearing by this Court in this case would serve the interests of litigants seeking to challenge highway projects, state and federal highway officials and the public at large. For these reasons, this petition for a writ of certiorari should be granted.

Dated, April 25, 1972.

Respectfully submitted,
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(Appendices Follow)

Appendix A

In the United States District Court
Northern District of California

No. C-71 1166 RFP

La Raza Unida, et al.,	*Plaintiffs,*
vs.	
Volpe, et al.,	*Defendants.*

MEMORANDUM AND ORDER

I. FACTS

This is a class action complaint for declaratory and injunctive relief in regard to State Project 238, a proposed highway of 14 miles that will pass through Hayward, Union City, and Fremont.

The system of roads involved here is the federal-aid primary highway system. (There are four federal-aid systems, the other three being interstate, urban, and secondary.) California normally receives approximately fifty million dollars per year for work on the primary system; this money is available on a 50-50, State-federal sharing basis.

Pursuant to 23 U.S.C. § 103 federal approval at various stages of highway design and construction is required before the state can receive federal funds.

First the state must approve a vague corridor for the highway; this step is called *systems approval. Location approval* is the second step in project development; at that time the route within the previously defined corridor is established. Federal approval is required here.

Pursuant to 23 U.S.C. § 106(a) and Policy and Procedures Memorandum (PPM) 20-8, the State Highway Department must obtain *design approval* and subsequently approval of *plans, specifications, and estimates* (P, S, and E) to be eligible for federal funding. The last approval stage is *construction approval,* at which time the state can receive federal funds. The state must have complied with certain requirements along the way in order to obtain the staggered approvals.

Prior to location approval the State must have held a public hearing, at which time a "corridor" is agreed upon. 23 U.S.C. § 128. Public hearings for the overall route location were held on November 14, 1960 and on April 14, 1961 in Hayward. Additional hearings for the portions in Fremont and in Union City were held on September 29, 1965 and on April 20, 1967, respectively. Plaintiffs allege that these meetings failed to comply with the requirements of 23 U.S.C. § 128 and Policy and Procedure Memorandum 20-8.

On October 5, 1965, the California Department of Public Works entered into a "freeway agreement" with the City of Hayward. In that agreement, the City approved that portion of Route 238 which would pass through Hayward and agreed to close certain

city streets when necessary to facilitate construction of the highway. The City also agreed to maintain and repair frontage roads built by the State. The Department of Public Works has not yet entered into an agreement with Union City, as Union City has refused to approve any extension of Route 238 within its city limits.

On November 4, 1966, the Federal Division Engineer for California gave federal "location approval" for Route 238. A key question here is what significance should be attached to this location approval. As stated above, this approval was the initial action necessary to qualify Route 238 for federal funds. State highway officials must still obtain federal design approval, P.S. & E. approval, and construction approval before the federal government is committed to finance construction. No such approvals have taken place.

The State has not requested, nor has it obtained, any federal funds for this project. There is a dispute as to whether the State will eventually request federal funds, plaintiffs saying "definitely" and defendants saying "probably not".

The State has already acquired a significant amount of land in Hayward—approximately 30-40% of the land it will need for the highway in that area. As a result of the State acquisition of land (and housing) in Hayward, persons residing on the right-of-way have been encouraged to leave and have left the area. There is a dispute as to the number of people who have left as "voluntary relocatees." Virtually no land has been purchased as yet in Union City or Fremont.

Plaintiffs have brought several causes of action to this court, seeking for the most part declaratory and injunctive relief. Under the first cause of action, they seek (a) a declaratory judgment that plaintiffs and their class are "displaced persons" under the Uniform Relocation Act, and that federal and state defendants do not have a satisfactory relocation program as required by the statutes; (b) an injunction enjoining the State defendants from acquiring any more property for right-of-way under the project and enjoining the federal defendants from granting any further approval of the project or providing funds for the project until a satisfactory relocation assistance program is devised; and (c) an order compelling state and federal defendants to show cause why funds committed to or available for the project should not be allocated for the construction or rehabilitation of housing units.

Second, plaintiffs seek a declaratory judgment and injunction against the City of Hayward in regard to replacement housing problems.

Third, plaintiffs allege that forcing the plaintiffs to confront a discriminatory and very tight housing market violates the equal protection clause of the fourteenth amendment, and seek relief consistent with this allegation.

Fourth, plaintiffs seek a declaratory judgment that the project falls within the National Environmental Policy Act and that defendants have failed to comply with the Act, as well as an injunction both preventing

State defendants from acquiring any more land for the project and forbidding the federal defendants from giving further approval to the project until the NEPA is complied with.

Fifth, plaintiffs seek similar relief under §4(f) of the Department of Transportation Act of 1966 [49 U.S.C. §1653(f)] and §138 of 23 U.S.C., both of which deal with the environment and which require the Secretary to minimize the harm to the environment after first assuring himself that no viable alternatives exist.

Sixth, plaintiffs allege that various hearing requirements have not been satisfied and that all work and approval of the project should be enjoined until the hearing requirements are complied with.

Seventh, plaintiffs further allege that the failure to hold adequate public hearings constitutes a violation of due process. They seek relief consistent with this allegation.

In an amendment to their complaint, plaintiffs claim that the state defendants are in violation of two State laws: the Ralph Act (Streets and Highways Code §§135.3-135.7) and the State Environmental Quality Act of 1970. The Ralph Act establishes a program for providing new or refurbished housing to "low-income individuals and families" who reside in an "economically depressed area." Plaintiffs seek a mandatory injunction under the Ralph Act and declaratory relief and an injunction under the State Environmental Quality Act of 1970.

II. Defendants' Motion to Dismiss

A. Jurisdiction over the Person

Both the state and federal defendants claim that sovereign immunity prevents the court from assuming jurisdiction here. In a condemnation setting the state normally cannot cannot be enjoined from acquiring land. In the present case, however, there is a question as to (1) the constitutionality of the state action, and (2) whether the officials involved have complied with state and federal statutes. Under *Ex Parte Young* 209 U.S. 123 (1908), these two situations are generally considered exceptions to the sovereign immunity doctrine. A state official who exceeds his authority or who violates the Constitution is not covered by the protective mantle of sovereign immunity. See, e.g., *Urbano v. Board of Managers,* 415 F.2d 247 (3d Cir. 1969).

In regard to the federal defendants, several cases, most notably *Larson v. Domestic and Foreign Corp.,* 337 U.S. 682 (1949), indicate rather strongly that if the federal official exceeds the authority vested in him, sovereign immunity does not apply, under the rationale that the person, not the sovereign, is being sued. Plaintiffs allege that the federal officials have not complied with statutory requirements; thus, sovereign immunity does not protect the federal officials here. See also *Citizens to Preserve Overton Park v. Volpe,* 401 U.S., 402 (1971).

B. Jurisdiction Over the Subject Matter

In most of the environmental protection and housing displacement cases where an injunction has been sought, the Secretary involved had already approved federal funds for the project. See e.g., *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971); *Western Addition Community Organization v. Weaver,* 294 F.Supp. 433 (N.D. Cal. 1968); *Citizens for the Hudson Valley and Sierra Club v. Volpe, et al.,* 425 F.2d 97 (1970), *cert. denied* 400 U.S. 949 (1970). In the present case, however, no federal funds have been contributed or authorized. Defendants argue that the project is therefore not a "federal-aid highway", and that the federal statutes and regulations do not apply until the project becomes a "federal-aid highway." Consequently, defendants have moved to dismiss plaintiffs' first and fourth causes of action on the grounds that plaintiffs have failed to state a claim upon which relief can be granted.

If a highway project is determined to be a "federal-aid highway", certain restrictions will eventually attach to the project against both the State and federal governments. For example, there must be (1) adequate hearings prior to location approval (23 U.S.C. §128); (2) an adequate relocation assistance program with replacement housing (23 U.S.C. §502, §§205, 210 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, DOT Instructional Memorandum (IM) 80-1-68, IM 80-1-71); and (3) assurances and determinations that any adverse consequences to the environment have been

considered and deemed necessary, in light of possible alternatives. (§138 of 23 U.S.C., §4(f), of the Department of Transportation Act of 1966, and DOT Order 5610.1).

Defendants argue that while a project becomes part of the federal-aid highway system upon location approval, the various restrictions do not apply until federal funds have been approved or federal participation is assured. Since Project 238 has received only location approval the federal requirements, according to defendants, do not yet apply. Any relief should be limited to an injunction preventing the Secretary of Transportation from giving his approval to further stages of the project until the state complies with the federal regulations. Plaintiffs, on the other hand, seem to argue that the statutes and regulations apply either upon location approval or when federal participation becomes inevitable.

Much of the argument on defendants' motion to dismiss has centered around semantic distinctions, but this court believes the basic issue to be as follows: do the federal regulations and statutes apply to a highway project upon location approval, construction approval, or some intermediate point when federal participation is assured?

One may conceptualize the problem as follows: there are three types or groups of highway projects. The first consists of those highways for which federal funds have been approved or are immediately sought. The parties agree that highways in this group are federal-aid highways. Federal participation here is

apparent, as federal funds have been appropriated or are about to be appropriated to the project.

The second group involves those state highways constructed without federal funds, and for which federal participation has never been sought, at any level. Congress very likely possesses the power to regulate the construction of these highways;[1] but one would be distorting the language of the statutes and regulations if one were to hold that the statutes and regulations apply to these highways.[2] It seems rather apparent that these "group II" highways are not federal-aid highways.

The third group of highways are those projects that may eventually receive federal funds. Normally there may be six to eight years between the corridor public hearing and construction approval. It is rather difficult to predict six years ahead of time whether or not federal funds will be needed; consequently, most states keep open the option on expensive projects by securing federal approval at various stages, in compliance with federal statutes.

The crucial question before this court is which of these "group III" projects are "federal-aid highways". As stated above, the state and federal defendants concede that a project becomes part of the federal-aid highway system upon location approval; they assert, however, that the statutes and regulations

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[1]See e.g., *Wickard v. Fillburn*, 317 U.S. 111 (1942).

[2]For example, under § 103 the federal-aid primary highway system within a state can be no more than 7% of the total mileage of a state highway system.

do not apply until the state actively seeks federal funds. Only at that point does a project become a "federal-aid highway" for the purpose of applying the statutes and regulations.[3] Plaintiffs seem to argue that a project becomes a federal-aid highway—and the federal regulations apply—when federal funding is highly likely or inevitable, or when the state indicates a definite intention to seek federal funds. (See Plaintiffs Supplemental Memorandum of September 13, 1971 at 19-23).

Both sides cite as authority *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department,* 40 U.S.L.W. 2098, August 24, 1971 (5th Cir., August 5, 1971); but that case is distinguishable from the one before us. In the *Conservation Society* case, the federal government had indicated at an early stage its intention to supply funds to the project. In the present case the state defendants have not received such assurances; indeed, the state asserts that it is highly unlikely that it will seek federal funds. In short, unlike the *Conservation Society* case, federal funding is far from "inevitable" here.

The state defendants cite a recent case to support their proposition that a project does not become a federal-aid highway—and the statutes do not apply—until federal funds are requested. *Northeast Area Welfare Rights Organization v. Volpe,* No. 3437 (D.

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[3]In other words, a project can be part of the federal-aid highway system but not be federal-aid highway until federal funds are approved. This semantic distinction merely disguises the crucial issue; when do the federal statutes and regulations apply to a project?

Wash. 1970). In that case, however, the project had not even received location approval, the most basic requirement for remaining eligible for federal funds. Unlike Project 238, the project in that case falls within "group II".

The court believes that for the purpose of applying the various federal statutes and regulations a federal-aid highway is any project for which the state has obtained location approval. The state should not have the considerable benefits that accompany an option to obtain federal funds without also assuming the attendant obligations. Any project that seeks even the possible protection and assistance of the federal government must fall within the statutes and regulations.

Several factors have convinced this court that the various federal restrictions are to apply against the defendants immediately. First, Congress has issued extremely strong policy statements against displacement and environmental destruction. 23 U.S.C. §501 reads as follows:

> Congress hereby declares that the prompt and equitable relocation and reestablishment of persons, businesses, farmers, and nonprofit organizations displaced as a result of the Federal highway programs and the construction of Federal-Aid highways is necessary to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole. Therefore, Congress determines that relocation payments and advisory assistance should be provided to all persons so

displaced in accordance with the provisions of this title.

Section 201 of Title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 reads as follows:

> The purpose of this title is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

Section 138 of 23 U.S.C. reads as follows:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public parks and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no

feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

Section 101 of the National Environmental Policy Act (NEPA) reads as follows:

Sec. 101. (a) The Congress recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintending consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depictable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Section 4(f) of the Department of Transportation Act of 1966 (DOT Act of 1966) is substantially the same as §138 of 23 U.S.C.

The legislative history of the Federal-Aid Highway Act of 1968, the Uniform Relocation Assistance Act

of 1970, Section 4(f) of the DOT Act of 1966, and the National Environmental Policy Act of 1969 shows an intense concern by the Congress over the problems of highway displacement and environmental protection. Prior to 1968, for example, the state was not required to make relocation payments to persons displaced by federal-aid highway projects. The 1968 Act required such payments, and the 1971 Act raised the level of such payments. See §§505, 506 of 23 U.S. C. and §§202, 203 of the Uniform Relocation Assistance Act of 1970. See also 1968 U.S. Code Congressional and Administrative News 3482-3539. Moreover, the 1968 and 1970 Acts both provide for federal advances for relocation payments before construction approval. See §504 and §208, with accompanying provisions. It seems rather clear to this court that Congress was well aware of the realities and hardships of highway displacement when it passed these acts, and that the main thrust and purpose of the 1968 and 1970 Acts was to protect displaced persons even before construction.

One reaches similar conclusions when examining the legislative history of the various environmental statutes and regulations; but one need not search that far to discover the Congressional intent here. NEPA, 23 U.S.C. §138, and §4(f) of the DOT Act of 1966 state in the *strongest* terms the importance that Congress attaches to environmental protection. As Justice Black stated in his concurrence in *Overton Park*, 28 L.Ed.2d at 156,

> That Congressional command [23 U.S.C. §138] should not be taken lightly by the Secretary or

> this Court. It represents a solemn determination of the highest lawmaking body of this Nation that the beauty and health-giving facilities of our parks are not to be taken away for public roads without hearings, fact-findings and policy determinations of a Cabinet officer—the Secretary of Transportation.

It is obvious, then, that strong federal policies exist towards adequate relocation assistance and protection of the environment.

A second factor this court believes significant is the language of the statutes and regulations themselves. By their very wording the statutes and regulations in question seem to apply to federal-aid projects *before* money has been appropriated and as early as location approval. Section 101(6) of the Uniform Relocation Assistance Act defines a displaced person as

> any person who, on or after the effective date of this act, moves from real property or moves his personal property from real property as a result of the acquisition of such real property in whole or in part, or as the result of the written order of the acquiring agency to vacate real property for a program or project undertaken by a federal agency, or with federal financial assistance.

The House Report accompanying the Bill describes this section as follows:

> If a person moves as a result of such a notice to vacate it is immaterial whether or not the real property is actually acquired.

> It is immaterial whether the real property is acquired before or after the effective date of this bill, or by Federal or State agency; or whether federal funds contribute to the cost of the real property. The controlling point is that the real property must be acquired for a federal or federally assisted program or project. For example:
>
> (a) A number of State highway departments frequently acquire rights-of-way for Federal-aid highways . . . with non-federal funds and seek federal financial assistance only for the actual construction work. Persons required to move from such rights-of-way are recognized as displaced persons under the relocation provisions of the Federal-Aid Highway Act of 1968 and this bill affirms that principle.
>
> 1970 U.S. Code Congressional and Administrative News 5853.

DOT Instructional Memorandum (IM) 80-1-71 (6) states that the regulations for displacement from highway projects apply to "any person who as of January 2, 1971 has not been displaced by any highway project on which federal-aid highway funds or other federal funds are or will be used."

IM 80-1-71 (7) also restricts the state at *any* phase of the project, not simply after federal funds have been appropriated.

> "7.a. No State highway department shall be authorized to proceed with any phase of any project which will cause the relocation of any person, or proceed with any construction project concerning any right-of-way acquired by the State without Federal participation and coming within

the provisions of paragraph 6a of this memorandum until it has furnished satisfactory assurances on a statewide basis that:

(1) relocation payments and services were or will be provided as set forth in this memorandum;

(2) the public was or will be adequately informed of the relocation payments and services which will be available as set forth (below)."

IM 80-1-71 (12) provides as follows:

States shall establish a relocation assistance advisory services program in order to provide the maximum assistance possible to persons required to relocate because of a Federal or Federal-aid highway program.

IM 80-1-71 (15) provides as follows:

The division engineer shall not authorize the state to proceed with negotiations on any project which will cause the relocation of any person until the State has submitted and he has approved the project assurances as provided for in paragraph 7b of this memorandum and the relocation plan required by subparagraph "b" below.

There is also strong evidence that the environmental regulations are to apply immediately. DOT Order 5610.1 indicates that 4(f) statements are required for any formal approval by the Secretary. Paragraph 4(A) provides as follows:

The requirements in this order . . . calling for either a negative declaration or a statement pursuant to Section 102(c) of the NEP Act *apply to, but are not limited to,* the following. . . :

> all grants, loans, contracts, . . . plans, . . . formal approvals (e.g., of non-federal work plans) . . . [emphasis added].

Paragraphs 3 (c) (3) of the definitional guidelines that accompany DOT Order 5610.1 states that "federal actions" (that is, those programs to which the regulations apply) include "approval of State highway programs and plans prior to grant of money."

Finally, paragraph 1 of the definitional guidelines states "When there is doubt whether or not to prepare a statement it should be prepared."

From the regulations alone it appears to this court that 4(f) statements and adequate relocation assistance programs are required before location approval, prior to federal funding of a project.

Finally, in addition to the strong policy statements and the wording of the statutes and regulations, common sense dictates that the federal protective devices apply before federal funds are sought. It does little good to shut the barn doors after all the horses have run away. If the federal statutes and regulations are to supply any protection at all it must be prior to the time the residents have left and the deleterious effects to the environment have taken place. All the protections that Congress sought to establish would be futile gestures were a state able to ignore the spirit (and letter) of the various acts and regulations until it actually receives federal funds.[4] Given the realities

[4]Indeed, we have seen what happens when a court refuses to apply the protections at an early stage of construction. See *Triangle Improvement Council v. Ritchie*, 429 F.2d 423 (4th Cir. 1970), *cert. dismissed as improvidently granted*, 39 U.S. L.W. 4596.

of actual highway displacement and construction, the statutes and regulations must apply immediately or their purpose will be frustrated.

Plaintiffs have demonstrated that Project 238 is a federal-aid highway project, and this court now holds that Sections 205 and 210 of the Uniform Relocation Assistance Act of 1970, §4(f) of the Department of Transportation Act of 1966, 23 U.S.C. §138, and various supporting statutes and regulations *presently* apply against the State and federal defendants. Consequently the motion by the State and federal defendants to dismiss the first and fourth causes of action for failure to state a claim upon which relief can be granted must be denied.[5]

* * * * * * * * *

The City Manager and Mayor of the City of Hayward have also moved to dismiss for failure to state a claim upon which relief can be granted. Plaintiffs basically assert two theories for holding these defendants responsible for possible violations of federal regulations: (1) The Freeway Agreement dated October 5, 1965 between the State of California and the City of Hayward links the City with any wrongdoings by the State; (2) the City has an obligation under

[5]In the *Conservation Society* case the Fifth Circuit held that once a project is considered a federal-aid highway, and the federal statutes and regulations apply to the project, these statutes and regulations will continue to apply even if the project is financed completely by state funds. The court believes it is unnecessary to consider at this time whether the federal protective devices would continue to apply if the State forecloses the possibility of federal assistance. As long as the State remains eligible for federal assistance, the project will be considered a federal-aid highway and the various federal regulations and statutes apply.

42 U.S.C. §1451 (c) to increase the supply of low-cost housing.

Neither of plaintiffs' theories is valid here. Plaintiffs first want this court to enjoin the City from carrying out its part of the highway agreement, which is to close certain city streets in order to facilitate construction. Such an injunction, however, would be both inadequate and unfounded. If the City refuses to close the streets the State, at obvious inconvenience, could build the highway anyhow.[6] But even if this were not so, the municipal defendants have done nothing to justify such an injunction. The City of Hayward has simply entered into an agreement with the State—not the federal government—to assist in some way in the construction of Project 238. The submitted affidavits and exhibits have shown that the City receives very little benefit from such an agreement. In some cases a city might be bound through an "agency" theory, but this is not such a case. The thrust of plaintiffs' complaint is directed against the State; it is unnecessary and confusing to join the municipal defendants to the action.

Plaintiffs' third cause of action, which alleges a violation of 42 U.S.C. §1451 by the municipal defendants, must also be dismissed. Section 1451 is an urban renewal statute which may impose upon a city that has entered into a contractual agreement for urban renewal funds the duty to increase the supply of low-cost housing. Unlike *West v. Housing Authority of*

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[6]See California Streets and Highways Code Sections 100.1 and 100.2.

the City of Atlanta, No. 13571 (N.D. Ga. (1971) and *Ley v. Shell Oil Co., et al.,* No. C-71 1645 RFP, which raise questions concerning the scope of §1451(c), there is no contractual agreement between the city and the federal government here; nor is this an urban renewal project. Moreover, the relevant statutes dealing with highway relocation—23 U.S.C. 501-11, and Uniform Relocation Assistance Act of 1970—impose no obligation upon the city to *increase* its supply of low-cost housing.

C. Standing

Defendants allege that all of the plaintiffs lack standing to raise the environmental issues in this suit. Certainly the plaintiffs residing in Hayward, Union City and Fremont have standing, as they shall be affected directly by any activities adverse to the environment. It is *their* parklands and forests that may be damaged. The State implies that plaintiffs must show that they own property adjacent to the park areas; the court disagrees. A showing that they use the park and live nearby is enough to satisfy the standing requirement for these plaintiffs.

Whether the Sierra Club has standing in this case is a more difficult question. Despite the Club's well-known history as a vigorous advocate of environmental causes, recent Ninth Circuit decisions would seem to preclude standing in this case. *Sierra Club v. Hickel,* 433 F.2d 24, *cert. granted* February 22, 1970; *Alameda Conservation Assoc., et al., v. State of California, et al.,* ..... F.2d ....., 1 ELR 20097 (1971). These cases contrast sharply with decisions in several other

circuits. See *Citizens Committee for the Hudson Valley and Sierra Cub v. Volpe, et al.,* 425 F.2d 97 (2d Cir. 1970), *cert. denied* 400 U.S. 949 (1970); *Environmental Defense Fund, Inc. v. Hardin,* 428 F.2d 1093 (D.C. Cir. 1970); *West Virginia Highlands Conservancy v. Island Creek Coal Co.,* 441 F.2d 232 (4th Cir. 1971). In order to resolve this conflict the Supreme Court has granted certiorari in *Sierra Club v. Hickel.*

In light of certain agreements by the parties and the history of the Sierra Club as a dedicated speaker for environmental causes, this court will grant the Sierra Club "conditional standing" to litigate this case, pending the Supreme Court decision in *Sierra Club v. Hickel.*

D. Class Action Questions

The federal defendants allege that plaintiffs have failed to satisfy the requirements for a class action under Rule 23 (a) of the Federal Rules of Civil Procedure. Specifically, they assert that "there are not questions of law or fact common to the class, nor are there typical claims or defenses common to all the plaintiffs or the class they purport to represent." (Federal Defendants' Brief of August 17, 1971 at p. 21). The court disagrees. See *Norwalk Core v. Norwalk Redevelopment Agency,* 395 F.2d 920 (2d Cir. 1968).

II. Plaintiff's Motion for Preliminary Injunction

From the above discussion it is apparent that Project 238 became a federal-aid highway project on November 4, 1966, the day it received federal location

approval. Such status necessarily entails certain responsibilities with regard to displaced persons and environmental protection. The various statutes and regulations apply immediately; they are not suspended until the State applies for federal funds. The court must now determine (1) whether the State has satisfied the requirements of the statutes and regulations, and (2) if it has not satisfied these requirements, whether a preliminary injunction should issue.

The various statutes and regulations, as discussed above, impose numerous constraints upon both the State and Federal governments in the cases of federal-aid highway projects. From various affidavits it appears that a substantial number of people have been displaced or are about to be displaced from the project. From the evidence thus far presented it also appears that, despite sincere efforts, the State has an inadequate relocation assistance program, as defined by §205 of the Uniform Relocation Assistance Act of 1970 and IM 80-1-71. The State, albeit in good faith, has failed to comply with the federal relocation statutes and regulations.

It is the determination of this court that a preliminary injunction should issue for these violations. Plaintiffs satisfy all of the requirements for a preliminary injunction:[7]

1. The harm to plaintiffs and the class they represent is clearly irreparable. One who is forced to vacate his chosen neighborhood or city, to sever long-standing

[7]See 7 Moore, Federal Practice ¶ 65.04.

friendships, to confront a tight and possibly discriminatory housing market, and to incur other indignities that are likely to be present here suffers severe and irreparable injury. Only after legislatively-authorized procedures have been complied with should displacement be permitted.

2. There is a high probability that plaintiffs will prevail on the merits.

3. The public interest favors the granting of the injunction. See 23 U.S.C. §501, IM 80-1-71, and Policy and Procedure Memorandum 20-8.

4. Any harm to defendants is clearly outweighed by the harm to plaintiffs were the preliminary injunction not issued.

The environmental regulations can be approached in a similar fashion. Though the State presently is attempting to compile 4(f) statements, no such statements have yet been submitted. As was discussed above, such statements are required when a project is likely to have an impact on the environment. See DOT Order 5610.1.

From the evidence presented it appears that Project 238 will have a most significant impact on the environment. The highway will probably cut through three parks: the Hayward Botanical Gardens, Hayward Memorial Park, and Fremont Central Park. There is also evidence that certain portions of Project 238 are proposed to be constructed over known fault areas. See Plaintiffs' Exhibit 42, affidavit of Professor George P. Simonds. These were the types of factors

Congress deliberately wanted to be taken into account when it said in §4(f) and §138:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

The court finds that a §4(f) statement is required for the 238 Project at the present stage of development. No more land should be acquired nor should any action be undertaken which would materially affect the environment until 4(f) statements have

been prepared and the Secretary is satisfied that (1) no feasible alternative route exists, and (2) any harm to the environment has been minimized.[8]

Dated, November 8, 1971.

/s/ Robert F. Peckham,
United States District Judge

Original Filed November 9, 1971,
Clerk, U.S. District Court,
San Francisco, California.

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[8]Plaintiffs also claim that (1) defendants' forcing them and members of their class to confront an allegedly discriminatory housing market violates the equal protection clause of the Fourteenth Amendment (third cause of action); (2) defendants have violated the National Environmental Policy Act of 1969 (fourth cause of action); (3) defendants have failed to hold proper hearings in compliance with 23 U.S.C. § 128 (sixth cause of action); (4) the failure to hold adequate hearings denied plaintiffs due process of law (seventh cause of action); (5) state defendants have violated the Ralph Act, California Streets and Highways Code §§ 135.3-135.7 (eighth cause of action); and (6) state defendants have violated the State Environmental Quality Act of 1970, California Public Resources Code, §§ 21000, et seq. (ninth cause of action). The complex questions raised by these claims need not be considered at this point in the litigation, as a preliminary injunction is sufficiently supported by other considerations.

In The United States District Court
Northern District of California

No. C-71 1166 RFP

La Raza Unida, The Sierra Club, et al.,
Plaintiffs,
vs.
John A. Volpe, et al.,
Defendants.

PRELIMINARY INJUNCTION

1. It Is Hereby Ordered, Adjudged, and Decreed, that pending the further Order of the Court, state defendants, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them or any of them are, each and all, hereby restrained and enjoined from:

(a) Acquiring any further real property in the Cities of Hayward, Union City, and Fremont, California, for right-of-way for the Route 238 Project; and

(b) Attempting to remove, threatening to remove, or acting to remove (by initiating contacts or making solicited or unsolicited offers or otherwise) any resident of premises located on or near proposed right-of-way for the Route 238 Project; and

(c) Undertaking any other actions whatsoever in connection with the Route 238 Project that would materially affect the environment.

2. It Is Further Hereby Ordered, Adjudged and Decreed, that commencing immediately, and thereafter until the further order of this Court, defendant VOLPE, his officers, agents, servants, employees, attorneys, and all persons in active concert with them or any of them, each and all, are hereby restrained and enjoined from continuing to accord or to accord any approval to the Route 238 Project or plans, maps, or other documents connected therewith.

3. It Is Further Hereby Ordered, Adjudged and Decreed, that no person restrained and enjoined by this Preliminary Injunction shall undertake to avoid compliance by any indirection.

4. Any person enjoined by this Preliminary Injunction may move for termination upon showing that Federal and State defendants have fully and reasonably complied with Sections 205 and 210 of the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970, P.L. 91-646, 84 Stat. 1894; Section 502(3) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 502(3); Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 1653(f); Section 138 of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138, and all Federal regulations promulgated under each of said statutes.

Dated, November 8, 1971.

/s/ Robert F. Peckham,
United States District Judge.

Appendix B

23 U.S.C. §103

§103. *Federal-aid systems*

(a) For the purposes of this title, the three Federal-aid systems, the primary and secondary systems, and the Interstate System, are continued pursuant to the provisions of this section.

(b) The Federal-aid primary system shall consist of an adequate system of connected main highways, selected or designated by each State through its State highway department, subject to the approval of the Secretary as provided by subsection (e) of this section. This system shall not exceed 7 per centum of the total highway mileage of such State, exclusive of mileage within national forests, Indian, or other Federal reservations and within urban areas, as shown by the records of the State highway department on November 9, 1921. Whenever provision has been made by any State for the completion and maintenance of 90 per centum of its Federal-aid primary system, as originally designated, said State through its State highway department by and with the approval of the Secretary is authorized to increase the mileage of its Federal-aid primary system by additional mileage equal to not more than 1 per centum of the total mileage of said State as shown by the records on November 9, 1921. Thereafter, it may make like 1 per centum increases in the mileage of its Federal-aid primary system whenever provision has been made for the completion and maintenance of 90 per centum

of the entire system, including the additional mileage previously authorized. This system may be located both in rural and urban areas. The mileage limitations in this paragraph shall not apply to the District of Columbia, Hawaii, Alaska, or Puerto Rico.

(c) The Federal-aid secondary system shall be selected by the State highway departments and the appropriate local road officials in cooperation with each other, subject to approval by the Secretary as provided in subsection (e) of this section. In making such selections, farm-to-market roads, rural mail routes, public school bus routes, local rural roads, county roads, township roads, and roads of the county road class may be included, so long as they are not on the Federal-aid primary system or the Interstate System. This system may be located both in rural and urban areas, but any extension of the system into urban areas shall be subject to the condition that such extension pass through the urban area or connect with another Federal-aid system within the urban area.

(d) (1) The interstate System shall be designated within the United States, including the District of Columbia, and, except as provided in paragraphs (2) and (3) of this subsection, it shall not exceed forty-one thousand miles in total extent. It shall be so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense and, to the greatest extent possible, to connect at suitable border points with routes of continental importance in the Dominion of Canada and the Republic of Mex-

ico. The routes of this system, to the greatest extent possible, shall be selected by joint action of the State highway departments of each State and the adjoining States, subject to the approval by the Secretary as provided in subsection (e) of this section. All highways or routes included in the Interstate System as finally approved, if not already coincident with the primary system, shall be added to said system without regard to the mileage limitation set forth in subsection (b) of this section. This system may be located both in rural and urban areas.

(2) In addition to the mileage authorized by the first sentence of paragraph (1) of this subsection, there is hereby authorized additional mileage for the Interstate System of two hundred miles, to be used in making modifications or revisions in the Interstate System as provided in this paragraph. Upon the request of a State highway department the Secretary may withdraw his approval of any route or portion thereof on the Interstate System within that State selected and approved in accordance with this title prior to the enactment of this paragraph, if he determines that such route or portion thereof is not essential to completion of a unified and connected Interstate System (including urban routes necessary for metropolitan transportation) and will not be constructed as a part of the Interstate System, and if he receives assurances that the State does not intend to construct a toll road in the traffic corridor which would be served by such route or portion thereof. After the Secretary has withdrawn his approval of

any such route or portion thereof the mileage of such route or portion thereof and the additional mileage authorized by the first sentence of this paragraph shall be available for the designation of interstate routes or portions thereof as provided in this subsection. The provisions of this title applicable to the Interstate System shall apply to all mileage designated under the third sentence of this paragraph, except that the cost to the United States of the aggregate of all mileage designated under the third sentence of this paragraph shall not exceed the cost to the United States of the aggregate of all mileage approval for which is withdrawn under the second sentence of this paragraph, as such cost is included in the 1968 Interstate System cost estimate set forth in House Document Numbered 199, Ninetieth Congress, as revised. In considering routes or portions thereof to be added to the Interstate System under the third sentence of this paragraph, the Secretary shall, in consultation with the States and local governments concerned, give due regard to (A) routes or portions thereof in States in which the Secretary has heretofore or hereafter withdrawn his approval of other routes or portions thereof, and (B) the extension of routes which terminate within municipalities served by a single interstate route, so as to provide traffic service entirely through such municipalities.

(3) In addition to the mileage authorized by paragraphs (1) and (2) of this subsection, there is hereby authorized additional mileage of not to exceed 1,500 miles for the designation of routes in the same manner

as set forth in paragraph (1), in order to improve the efficiency and service of the Interstate System to better accomplish the purposes of that System.

Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 887 as amended by Pub.L. 86-70, §21(d)(1), June 25, 1959, 73 Stat. 145; Pub.L. 86-624, §17(b), (c), July 12, 1960, 74 Stat. 415; Pub.L. 87-866, §8(a), Oct. 23, 1962, 76 Stat. 1147: Pub. L. 90-238, Jan. 2, 1968, 81 Stat. 772; Pub.L. 90-495, §§14, 21, Aug. 23, 1968, 82 Stat. 822, 826.

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23 U.S.C. §106

§106. *Plans, specifications, and estimates*

(a) Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title.

(b) In addition to the approval required under subsection (a) of this section, proposed specifications

for projects for construction on the Federal-aid secondary system, except in States where all public roads and highways are under the control and supervision of the State highway department, shall be determined by the State highway department and the appropriate local officials in cooperation with each other.

(c) Items included in any such estimate for construction engineering shall not exceed 10 per centum of the total estimated cost of a project financed with Federal-aid primary, secondary, or urban funds, after excluding from such total estimated cost, the estimated costs of rights-of-way, preliminary engineering, and construction engineering: *Provided,* That such limitation shall be 15 per centum in any State with respect to which the Secretary finds such higher limitation to be necessary. For any project financed with interstate funds, such limitation shall be 10 per centum.

Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 892 as amended by Pub.L. 88-157, §7(a), Oct. 24, 1963, 77 Stat. 278.

23 U.S.C. §138
and
49 U.S.C. §1653(f)

82 Stat. 823

SEC. 18. (a) Section 138 of title 23, United States Code, is amended to read as follows:

"§ 138. Preservation of Parklands

"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate

[82 Stat. 824]

and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area,

wildlife and waterfowl refuge, or historic site resulting from such use."

(b) Section 4(f) of the Department of Transportation Act (80 Stat. 931; Public Law 89-670) is amended to read as follows:

"(f) It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning o minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

23 U.S.C. §502
82 STAT. 831

§ 502. *Assurances of adequate relocation, assistance program*

The Secretary shall not approve any project under section 106 or section 117 of this title which will cause the displacement of any person, business, or farm operation unless he receives satisfactory assurances from the State highway department that—

(1) fair and reasonable relocation and other payments shall be afforded to displaced persons in accordance with sections 505, 506, and 507 of this title;

(2) relocation assistance programs offering the services described in section 508 of this title shall be afforded to displaced persons; and

(3) within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment.

Pub.L. 90-495, §30, Aug. 23, 1968

23 U.S.C. §504

82 STAT. 831

§ 504. *Federal reimbursement*

(a) The Secretary shall approve, as a part of the cost of construction of a project under any Federal-aid highway program which he administers, the cost of providing the payments and services described in section 502, except that notwithstanding any other law, the Federal share of the first $25,000 of such payments to any person, on account of any real property acquisition or displacement occurring prior to July 1, 1970, shall be increased to 100 per centum of such cost.

(b) Any project agreement with a State highway department executed before the date of enactment of this chapter with respect to property which has not been acquired as of the date of enactment of this chapter under any such program shall be amended to include the cost of providing the payments and services described in section 502 with respect to such property.

Pub.L. 90-495, §30, Aug. 23, 1968

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1394

THE CALIFORNIA HIGHWAY COMMISSION, ET AL., PETITIONERS

v.

LA RAZA UNIDA OF SOUTHERN ALAMEDA COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT[1]

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to a request by this Court on August 17, 1972, that the United States express its views. The question presented is whether this Court should grant certiorari before judgment by the court of appeals to review the issuance of a preliminary injunction blocking a state highway project. On the merits, the issue is whether a State should be required to comply with Sec-

[1] The petition asks for a writ of certiorari to the United States District Court for the Northern District of California. However, an appeal has been docketed in the court of appeals, and the writ would properly issue to that court.

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tion 4(f) of the Department of Transportation Act of 1966, 80 Stat. 931, 934, as amended, 49 U.S.C. 1653(f); Section 18(a) of the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U.S.C. 138; and the National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. 4321, where the sole federal participation in the project has been grant of location approval by the Federal Highway Administration, which took place prior to the enactment of those statutes, and where no federal funds have been committed to the project.

1. This is a class action against federal and state defendants for declaratory and injunctive relief in regard to California State Project 238, a proposed 14-mile highway from Interstate Route 680, near Mission San Jose, to Interstate Route 580, north of Hayward, California. The highway would pass through Hayward, Union City, and Fremont, California. It is proposed as part of the Federal-Aid Primary System, for which money is available on a 50–50 state-federal sharing basis.

Under 23 U.S.C. 103, various stages of federal approval of a project must occur before federal funding can be granted. The first step is system approval. The second is location approval, which establishes the routing within the previously defined system corridor. Prior to location approval the state must hold a public hearing. In this case, public hearings on the overall route location were held on November 14, 1960, and April 14, 1961. Hearings for the portion in Fremont and Union City were held on September 29, 1965, and April 20, 1967, respectively (Pet. App. A, pp. i–ii).

Federal location approval for Route 238 was given by the Federal Division Engineer for California on November 4, 1966. If the highway is to become a federally aided project, state highway officials must still obtain federal design approval; plans, specifications and estimate (P, S and E) approval; and construction approval. The State has not requested or obtained any federal funds for the project but has, with its own funds, acquired land in the project right-of-way. This has occurred predominantly in Hayward, where 30–40 percent of the necessary land has been acquired. As a result, persons residing on the right-of-way have been encouraged to leave. There is a dispute as to the number of people who have left as "voluntary relocatees" (*id.* at iii).

A hearing was held on plaintiffs' motions for a preliminary injunction and on the federal and state defendants' motions to dismiss in late September 1971. On November 9, 1971, the court filed a memorandum and order holding as follows (*id.* at xi):

> The court believes that for the purpose of applying the various federal statutes and regulations a federal-aid highway is any project for which the state has obtained location approval. The state should not have the considerable benefits that accompany an option to obtain federal funds without also assuming the attendant obligations. Any project that seeks even the possible protection and assistance of the federal government must fall within the statutes and regulations.

The district court based this ruling on two considerations: congressional policy statements expressing concern about highway-created displacement and environmental protection, including their legislative histories; and the language of the statutes and regulations themselves, which in the court's view indicates that they apply to federal-aid projects before money has been appropriated and as early as location approval (*id.* at xiv–xx).

The court then held that Sections 205 and 210 of the Uniform Relocation Assistance Act of 1970, 84 Stat. 1894, 42 U.S.C. 4625, 4630; Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 1653(f); Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138, and various supporting statutes and regulations apply against the state and federal defendants. Further, it held that the State's relocation assistance program is inadequate to meet the requirements of Section 205 of the Uniform Relocation Assistance Act of 1970 and those of DOT Instructional Memorandum 80–1–71, and that a preliminary injunction should issue for these violations (Pet. App. A, pp. xxiv–xxv). In regard to environmental regulations, the court held that the Route 238 project "will have a most significant impact on the environment" and "will probably cut through three parks" (*id.* at xxv). Therefore, the court found that a "§ 4(f) statement" (49 U.S.C. 1653(f)) concerning injury to parklands is required for Project 238 at its present state of development and that no more land should be acquired nor action be undertaken which would materially affect the environment until such statements have been prepared and

the Secretary of Transportation is satisfied that (1) no feasible alternative route exists and (2) any harm to the environment has been minimized (Pet. App. A, pp. xxvi–xxvii).

By preliminary injunction filed November 9, 1971, the state defendants were enjoined from acquiring any further real property, moving residents or undertaking any action which would affect the environment in connection with the project (*id.* at xxviii–xxix). The injunction specifies that a motion for its termination may be made upon a showing of compliance with the various statutes and regulations involved. The preliminary injunction apparently restrains the state defendants from continuing the project even if the State irrevocably commits itself to proceed without federal assistance. However, the memorandum and order of the district court states (*id.* at p. xx, n. 5):

> * * * The court believes it is unnecessary to consider at this time whether the federal protective devices would continue to apply if the State forecloses the possibility of federal assistance. * * *

2. We do not believe that this is a suitable case for utilization by this Court of the extraordinary procedure of certiorari before judgment in the court of appeals. Rule 20 specifies that such review is limited to cases of "imperative public importance," and the very limited use that has historically been made of this power manifests the Court's reluctance to disrupt normal appellate processes. Such review has been reserved for cases such as the President's seizure of the steel industry, *Youngstown Co.* v. *Sawyer,* 343

U.S. 579, and the wartime saboteurs case, *Ex Parte Quirin,* 317 U.S. 1. This case is not of that magnitude of importance and is otherwise inappropriate for review before judgment in the court of appeals for the following reasons:

(a) The particular subject matter of the instant litigation is not of overwhelming urgency. The highway project has been in the planning stage for at least twelve years, and the additional delay entailed in obtaining a decision in the court of appeals would not appear critical.

(b) It is not clear that a decision in this case would decisively answer the general question of when a state highway project becomes irrevocably subject to federal requirements protecting displaced individuals and the environment. The particular circumstances of this case involve special equities favorable to the State (see point 3, *infra*), and there is no indication that a significant number of projects throughout the country are so similar on their facts to the situation here that they are likely to be controlled by a decision in this case.

(c) Because California has not irrevocably committed itself to renunciation of federal funding for this project, the district court did not clearly resolve whether under its decision the limited federal involvement here present, combined with such a renunciation, would relieve the State of the duty of meeting federal requirements (Pet. App. A, p. xx, n. 5).

(d) At the time of the filing of the present petition, there was pending before this Court a certiorari peti-

tion in a case raising similar issues, *Texas Highway Department* v. *Named Individuals,* No. 71–1198. In that case the court of appeals for the Fifth Circuit held (446 F.2d 1013) that a highway project that had been commenced with federal funds could not be withdrawn from federal participation (and requirements) by being completed with state funds only. This Court will on occasion grant certiorari before judgment when a case raises issues identical or closely related to those presented in another case pending before it (*e.g., Taylor* v. *McElroy,* 358 U.S. 918, 360 U.S. 709, 710; *Porter* v. *Dicken,* 328 U.S. 252, 254), but that possible basis for certiorari before judgment in the present case was eliminated when the Court denied certiorari in *Texas Highway Department* on May 15, 1972 (406 U.S. 933).[2]

3. With regard to the merits, the interests of the United States are not directly affected by the determination of whether or not California should be allowed to "go it alone" at this stage.[3] However, it is our view that on the facts of this case California should be allowed to withdraw from and permanently foreclose federal participation in this project. Here California obtained location approval, thereby acquiring federal status for the project under the decision in this case, prior to the enactment of the relevant

[2] As petitioners (Pet. 16–17) and the district court (Pet. App. A, p. x) note, the two cases differ significantly on their facts, because of the extensive federal participation in the Texas project.

[3] The United States, accordingly, has not appealed from the district court's decision.

statutes. It appears inequitable that, by obtaining location approval, California should be bound to an election it did not know it was making, did not know would be irrevocable, and the legal consequences of which had not yet been enacted. Therefore, California, if it wishes, should be allowed to proceed on its own with the project—an avenue now apparently foreclosed by the district court's preliminary injunction.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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